

STATE OF MICHIGAN
SUPREME COURT OF MICHIGAN

GRAND TRUNK WESTERN RAILROAD, INC.,
Plaintiff,

Supreme Court No: 126609

vs

Court of Appeals No: 244246

AUTO WAREHOUSING, CO.,
Defendant.

Lower Court No: 00-017068 CK

JOSEPH J. MCDONNELL (P32056)
Durkin, McDonnell, Clifton &
O'Donnell, P.C.
Attorneys for Grand Trunk Western Railroad
645 Griswold, Ste. 3253
Detroit, MI 48226
(313) 963-3033

STEVEN M. POTTER (P33344)
RICK J. PATTERSON (P55706)
Potter, Carniak, Anderson & DeAgostino
Attorneys for Auto Warehousing Company
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

126609-
PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S APPLICATION FOR
LEAVE TO APPEAL

CERTIFICATE OF SERVICE

FILED

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STATEMENT OF PLAINTIFF-APPELLEE REGARDING
JURISDICTION OF THE SUPREME COURT

Defendant-Appellant did not submit a jurisdictional statement. Plaintiff-Appellee, Grand Trunk, does not contest that the Application for Leave was timely filed under MCR 7.302(c).

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS PROPERLY CONCLUDED THE AMOUNT OF GRAND TRUNK WESTERN RAILROAD'S SETTLEMENT WITH MR. THOMAS FOR THE INCIDENT OF JANUARY 11, 1999 WAS REASONABLE?

Defendant, Auto Warehousing Answers "No."

Plaintiff, Grand Trunk Western Railroad Answers "Yes."

The Court of Appeals Answered "Yes."

COUNTER-STATEMENT OF FACTS

This is an action by plaintiff-appellee, Grand Trunk Western Railroad, Inc. (plaintiff/Grand Trunk) to enforce its right to indemnity from defendant-appellant, Auto Warehousing Company (defendant/Auto Warehousing), under the terms of a Lease Agreement entered into between the two parties. This demand for indemnity arises out of injuries sustained by Mr. Terry Thomas, an employee of Grand Trunk, who sued the railroad under the Federal Employers' Liability Act, 45 U.S.C. §51 et. seq. (FELA) for injuries he sustained on January 11, 1999 when he slipped and fell in snow on the premises of Auto Warehousing. Given the opinion of the Court of Appeals, AutoWarehousing no longer contests that, under the facts of this case, it owed indemnity to Grand Trunk under the agreement. Nor does Auto Warehousing now contest that Grand Trunk was potentially liable to Mr. Thomas for the January 11, 1999 incident under the FELA. Instead, in its application for leave to appeal to this Court, Auto Warehousing continues to complain, with no basis in fact and despite the majority opinion of the Court of Appeals, that the amount of Grand Trunk's settlement with Mr. Thomas was unreasonable.

I. Procedural Statement of The Case

On December 7, 1998 Mr. Terry Thomas, an employee of Grand Trunk, filed an action under the FELA for injuries he allegedly sustained on December 29, 1997. The case was assigned No. 98-839019-NO in Wayne County Circuit Court and was placed on the docket of Judge John A. Murphy. Shortly after filing that action, Mr. Thomas, who had undergone treatment and rehabilitation for his injuries sustained in 1997, **returned to work with Grand Trunk without restrictions during the later part of December 1998.** ¹

¹ Auto Warehousing at pg. 1 of its brief incorrectly asserted Mr. Thomas returned to "light duty" work. While Mr. Thomas did initially work light duty, by late December 1998 he had been returned to work with no restrictions.

On January 11, 1999, Mr. Thomas was injured during the course of his railroad employment when he slipped in snow while attempting to operate and clean a snow covered rail switch on premises leased by Grand Trunk to Auto Warehousing. On August 6, 1999, Mr. Thomas filed an Amended Complaint in his pending action, seeking in Count II to recover from Grand Trunk for permanent disabling injuries sustained in the January 11, 1999 accident at Auto Warehousing.

It is conceded that on February 8, 2000 Grand Trunk tendered its defense of Count II of Mr. Thomas' Amended Complaint to Auto Warehousing and there is no dispute that this tender was declined. Thereafter on May 26, 2000 Grand Trunk filed this action (Case No. 00-17068 CK) against Auto Warehousing to enforce the indemnity provisions of the Lease Agreement between the parties. This action was also assigned to Judge Murphy who consolidated both this case and Mr. Thomas's action under the later number by way of an Order dated March 5, 2001.

On May 24, 2001 Grand Trunk filed a Motion For Partial Summary Judgment On The Issue Of Liability against Auto Warehousing. Auto Warehousing filed its response to the motion on July 5, 2001. While the motion was pending, the Trial Court scheduled a special facilitation/mediation. At the facilitation/mediation, the Honorable Michael L. Stacey evaluated Mr. Thomas' two claims against Grand Trunk as having a total value of \$725,000.00 with \$100,000.00 being allocated to the first incident of December 29, 1997 (from which Mr. Thomas returned to work), and \$625,000.00 was allocated to the January 11, 1998 incident, from which plaintiff was never able to return to work. Judge Stacey made a specific finding that the \$625,000.00 was reasonable. The award is attached hereto as **Exhibit A.**²

² AutoWarehousing's claim at page 15 of its brief that Grand Trunk unilaterally allocated 85% of the settlement to the second accident is false.

Judge Stacey was unable to resolve the claims between Grand Trunk and Auto Warehousing but did confirm in his award that Auto Warehousing again refused the tender of the defense, and offered only \$50,000.00 in settlement of the indemnity claim. (Id.). Auto Warehousing was also notified at the facilitation/mediation that Grand Trunk would settle Count II of Mr. Thomas' claims for \$625,000.00 plus medical expense paid to date and proceed with its claim of indemnity against Auto Warehousing. (Id.). Grand Trunk accordingly settled Mr. Thomas' actions against it under the foregoing terms.

Thereafter, Grand Trunk filed an Amended Motion For Summary Disposition seeking complete summary judgment in the amount of its \$625,000.00 settlement of Mr. Thomas' second claim along with its costs and attorney fees incurred in having had to defend the action, given Auto Warehousing's refusal of the tender. Auto Warehousing filed a response to that motion on or about November 13, 2001. Grand Trunk filed a reply brief on January 11, 2002. Oral Argument on the motion was held on January 18, 2002. On February 22, 2002, Judge Murphy issued an Opinion granting summary judgment in favor of the railroad against Auto Warehousing in the amount of \$625,000.00 plus its costs and attorney fees in defending Mr. Thomas' second claim.³ (**Exhibit B**). On June 21, 2002 the trial court entered an Order entitled Amended Summary Judgment ordering Auto Warehousing to indemnify Grand Trunk in the amount of \$625,000.00, reserving the award of any attorney fees or case evaluation sanctions until after any appeal. (**Exhibit C**). On September 18, 2002, the trial court entered an Order formally dismissing both of Mr. Thomas' claims against Grand Trunk, thereby resolving the remaining issues in the case.

³ The trial court's opinion mistakenly used the figure of \$650,000.00.

Auto Warehousing filed this appeal on October 8, 2002. Briefs were filed and Oral Argument was held in the Court of Appeals on February 11, 2004. On June 10, 2004 the Court of Appeals issued its opinion affirming the grant of summary judgment. (**Exhibit D**). On July 21, 2004 AutoWarehousing filed this application seeking leave to appeal from that portion of the Court of Appeals opinion that found the amount of Grand Trunk's settlement with Mr. Thomas was reasonable.

II. Mr. Thomas' Injuries:

A. The December 29, 1997 Incident:

In the December 29, 1997 incident, plaintiff sustained injury to his right shoulder and left knee. The mechanism of this injury and the surrounding facts are not relevant to the issues of this appeal. What is relevant is that Mr. Thomas underwent surgery to his knee and shoulder, and after undergoing rehabilitation, which included working at light duty for much of the time he was off, was **released by his physicians to return to work without restrictions prior to the incident complained of.**

Contrary to the assertions in Auto Warehousing's brief, on December 17, 1998, Mr. Thomas was released to return to work at the railroad as a brakeman/conductor without restrictions, as evidenced by the return to work slip provided by Dr. McNamee, Mr. Thomas' surgeon. (**Exhibit E**). Dr. McNamee's deposition testimony also confirms that Mr. Thomas could perform "all of his normal activities" at the time of his release to return to work. (**Exhibit F**, pp. 16-17). Dr. Weiss, a physiatrist treating Mr. Thomas, on whom Auto Warehousing also relies for its erroneous assertion regarding restrictions, likewise recorded that Mr. Thomas "will be able to resume work activity as of 12/26/98." (**Exhibit G**). Dr. Weiss testified that whatever

restrictions Mr. Thomas may have had, “he could perform all of his work activities within the restrictions I have outlined without needing restrictions for his employer.” (**Exhibit H**, p.16).

Whatever else may be true, when Mr. Thomas returned to work in December of 1998, there were no restrictions placed by his physicians on his job duties as a brakeman/conductor. Mr. Thomas’s claims for his first accident, in which he sustained little wage loss and returned to full duties within one year, was settled by Grand Trunk for the sum of \$100,000.00, which was deemed by Judge Stacey to be reasonable. (**Exhibit A**).⁴ Grand Trunk’s settlement of Mr. Thomas’ first accident is not part of the indemnity claim here.

B. The Incident of January 11, 1999:

On the evening of January 11, 1999, Mr. Thomas was a 50-year-old conductor working as part of a Grand Trunk train crew providing service to Auto Warehousing. Mr. Thomas sustained an injury when he slipped and fell on snow and ice that had accumulated around the rail switches on the AutoWarehousing premises. As set forth in AutoWarehousing’s application for leave to appeal, AutoWarehousing is not contesting that plaintiff fell on the date in question or even that he sustained injury. Nor does Auto Warehousing contest that Grand Trunk was potentially liable to Mr. Thomas under the FELA. Nonetheless, Auto Warehousing still asserts the amount of money paid by Grand Trunk in settlement of his claims for January 1999 was unreasonable. The facts set forth below demonstrate that the only unreasonable party is Auto Warehousing.

In the accident of January 11, 1999 Mr. Thomas injured his right knee and left shoulder. He underwent surgery on his right knee on June 22, 1999 and left shoulder on October 4, 1999.

⁴ As noted by Judge Stacey, the settlement of the first accident included also \$85,000, which had already been paid to Mr. Thomas by the railroad for restricted duty wages, resulting in a total settlement of the first accident of \$185,000.

Contrary to the assertions by Auto Warehousing, Mr. Thomas also aggravated the prior injuries to his left knee and right shoulder from his December 1997 accident. Mr. Thomas underwent additional surgery to the left knee on March 7, 2000. Likewise, in September of 2000 Mr. Thomas was required to undergo additional surgery on his right shoulder. The physicians who treated Mr. Thomas have testified that he is now permanently disabled from his job as a railroad conductor or trainman.

All of the treating physicians testified that Mr. Thomas' right knee and left shoulder injuries were caused by the January, 1999 accident. Dr. Weiss, who treated the Mr. Thomas for all of his injuries to both shoulders and both knees, testified that, in his opinion, the 1999 accident was the cause of Mr. Thomas' disability. (**Exhibit H**, p. 38). Dr. Weiss testified that Mr. Thomas was able to return to work even though he was having some difficulty with his right shoulder following the 1997 accident, because he was able to perform his work using his good left shoulder and right knee. (Id, p. 37). However, following the accident in January 1999, Mr. Thomas was disabled because he no longer had one good shoulder and one good knee to rely on. (Id, pp. 38, 39, 42-43). In other words, but for the January 1999 incident, Mr. Thomas would have continued to work. Furthermore, Dr. Weiss testified that, as a result of the injuries incurred in January 1999, Mr. Thomas most likely aggravated his prior injury to his right shoulder and left knee by overcompensating for the new injuries. (Id. p. 39).

Auto Warehousing selectively cites the testimony of Dr. Ciullo to claim that plaintiff was unable to return to work because of his right shoulder and not his left shoulder. Dr. Ciullo actually testified that he could not say whether or not plaintiff could have returned to work following the January, 1999 accident because of the combination of plaintiff's disabilities and not knowing the particular details of plaintiff's job. (**Exhibit I**, p. 27). Moreover, Dr. Ciullo

could express no opinion as to the impact of Mr. Thomas' knee problems on his ability to work. (Id. p.28).

Auto Warehousing also claims that Dr. Pickering, who treated plaintiff following the January 11, 1999 accident for his knees, testified that plaintiff would have been disabled from his job because of his left knee, as well as his right knee. However, Dr. Pickering testified that there was no question that he was disabled from his job as a result of the injury to his **right** knee sustained in the second accident at Auto Warehousing. (**Exhibit J**, p. 35, 37). Dr. Pickering also admitted that his statement in response to Auto Warehousing's questions, suggesting Mr. Thomas would have been disabled from his job solely because of his left knee injury, was total speculation. (Id.) Dr. Pickering explained that he could not say how long, Mr. Thomas may have continued to work had the January 11, 1999 incident not occurred, conceding that it could have been one month or for another 10 years. (Id., p. 37).

The only opinions expressed by the physicians who treated Mr. Thomas, regarding his future ability to work, was the **testimony by Dr. Weiss that Mr. Thomas was permanently disabled from his job as a railroad conductor as a result of the 1999 accident**, and the **testimony by Dr. Pickering that Mr. Thomas was disabled from performing his job as a railroad conductor due to the injury to his right knee which was caused by the January 11, 1999 accident**. (**Exhibit H**, pp. 38-39, 42-43; **Exhibit J**, p. 35, 37).

Consistent with the foregoing, counsel for Mr. Thomas at the facilitation/mediation submitted the report of vocational rehabilitation expert, Dr. Robert Ancell, attached as **Exhibit K**. The report indicates that, given his education and disability since the January 11, 1999 incident, Mr. Thomas was "essentially unemployable." Auto Warehousing did not dispute that plaintiff was earning between \$85,000.00 and \$95,000.00 per year at the time of the January 11,

1999 incident. Given those annual earnings, his gross lost wages to age 65 were \$1,190,000.00. Mr. Thomas' expert economist submitted a report, attached to Grand Trunk's Reply Brief on the Amended Motion for Summary Judgment as Exhibit F, which sets forth a claimed net wage loss and loss of benefits totaling \$1,033,622.00. The report is attached as **Exhibit L**. Based on **Exhibit L**, (and not undisputed by Auto Warehousing) only \$10,459.00 of the total wage loss was attributable to the first accident in 1997.

ARGUMENT

I. Standard of Review:

This Court's review of a Motion for Summary Disposition, like the review by the Court of Appeals, is de novo. *Spiek v. Michigan Department of Transportation*, 456 Mich. 331, 572 NW2d 201 (1998). Grand Trunk's motion was brought pursuant to MCR 2.116(C)(10) and the test to be applied by the Court in reviewing that motion is to consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action, and determine whether there is any genuine issue of any material fact existing to warrant a trial. (*Id.* at 338).

The party opposing the motion cannot rest on his pleadings but has the burden of showing that a genuine issue of disputed fact exists. *Pete v. Iron Co.*, 192 Mich. App. 687, 689; 481 NW2d 731 (1992). As MCR 2.116(G)(4) points out: "when a motion under sub rule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

II. The Elements of Grand Trunk's Indemnity Claim.

When an indemnitee, such as Grand Trunk, has settled the primary claim against it before liability has been determined, but after the indemnitor has declined the opportunity to defend the action, the elements of the indemnity claim were described succinctly in *Consolidated Rail Corporation v. Ford Motor Company*, 751 F. Supp. 674 (1990).

[A]n indemnitee who settles a claim against it before liability has been determined, need only show potential liability in order to require the indemnitor to indemnify him for the settlement that has been paid out.

751 F. Supp. 674 at 676 (emphasis supplied).

This is consistent with the Court of Appeals holding in *Trim v. Clark Equipment Company*, 87 Mich App. 270 (1978) wherein the court described what was necessary to prevail on a claim of indemnity:

The policy of this state is to encourage settlements of suits. The settlement of a suit benefits both parties and the public. **If this policy is to be effective, the burden on the defendant who settles after a tender of defense to the contractual indemnitor is refused must not be too heavy.** ... We, therefore hold that to recover on the contract of indemnity, Clark need show only its potential, as opposed to its actual, liability to Trim and Ford.

To recover under these circumstances the indemnitee must show that the fact situation of the original claim is covered by indemnity and that the settlement is reasonable. *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296 (CA 5 1973).

Potential liability means nothing more than that the indemnitee acted reasonably in settling the underlying suit. **The reasonableness of the settlement consists of two components, which are interrelated. A fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of the judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed.** ... If the amount of the settlement is reasonable in light

of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle.

87 Mich. App. 270 at 277-278 (emphasis supplied).

The foregoing language was cited by the Court of Appeals in this case. (**Exhibit D**, p.6).

The majority opinion also emphasized the reduced burden on the indemnitee in this situation:

If an indemnitor has notice of an action and declines the opportunity to defend it, the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnity might thereafter make.

Exhibit D, p.5. Citation omitted. The majority opinion of the Court of Appeals also explained that the issue of the reasonableness of the settlement did not require the indemnitee to show that a trial of the principal claim would have yielded the same result, because to do so would “contravene the policy of encouraging the settlement of lawsuits.” (Id. p.9).

The propriety of the Court of Appeals determination that the settlement was reasonable is the sole basis for Auto Warhousing's claim in its application that it is a victim of “material injustice.”

III. The Court of Appeals Properly Determined Grand Trunk's Settlement with Mr. Thomas was Reasonable:

A. The Court of Appeals Was Entitled to Review the Record De Novo.

Defendant first complains that the trial court did not make any determination as to the reasonableness of the settlement and that, despite this fact, the Court of Appeals went on to make the determination, of which defendant now seeks review. Assuming this was true (and plaintiff believes defendant unfairly characterizes the trial court's opinion), it is of no moment.

As set forth above, when the Court of Appeals, as this Court, reviews a motion for summary disposition brought under MCR 2.116(C)(10), it does so de novo. *Spiek v. Michigan Department of Transportation*, 456 Mich. 331, 572 NW2d 201 (1998). The Court of Appeals

was required to review the same record as the trial court and determine if the motion brought by Grand Trunk should have been granted. *Id.* p. 338. That is precisely what the Court of Appeals did in this case. To the extent Auto Warehousing was entitled to a judicial determination and analysis on the issue of the reasonableness of the settlement, it received that determination and analysis in the Court of Appeals. The review of a summary disposition motion is simply the review of the paper record submitted to the court with the benefit of counsels' argument.

It does not matter that the Court of Appeals decided the case on a different basis than the trial court. The Court of Appeals, as is this Court, was free to affirm Judge Murphy's grant of summary judgment, so long as he reached the right result, even if for a different reason.

Carpenter v. School District of the City of Flint, 115 Mich. App. 683, 321 NW 2d 772 (1982);

Portice v. Otsego County Sheriff's Department, 169 Mich. App. 563, 426 NW 2d 706 (1988).

That is precisely what occurred here. The trial court concluded indemnity was required based on the failure to defend, utilizing an analogy to insurance law and without ever analyzing whether the settlement was reasonable in light of Grand Trunk's potential liability to Mr. Thomas under indemnity law. The Court of Appeals extensively reviewed the record, applied the proper law, and reached the proper result.⁵

B. The \$625,000.00 Settlement Was Reasonable Under the Facts of This Case.

1. The Impact of the FELA on the Reasonableness of the Settlement.

Auto Warehousing continues to ignore the impact of the FELA on Grand Trunk's potential liability to Mr. Thomas for the January 11, 1999 incident, as supporting the reasonableness of that settlement. Under the FELA, Grand Trunk has a duty to exercise ordinary

⁵ Interestingly, Auto Warehousing does not contest in this Appeal the authority of the Court of Appeals to determine the contract in question required indemnity and that Grand Trunk was potentially liable to Mr. Thomas, notwithstanding the reasons provided by the trial court.

care to provide its employees with a reasonably safe place to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352, 63 S.Ct. 1062, 87 L.Ed. 1444(1943). The courts have consistently held that the FELA is a broad remedial statute that is to be liberally construed in order to effectuate its purposes. *Kulavic v. Chicago & Illinois Midland Ry.*, 1 F. 3d 507, 512 (7th Cir. 1993). In *Payne v. Baltimore & Ohio R. Co.*, 309 F.2d 546 (6th Cir. 1962), the Sixth Circuit explained:

A railroad has a nondelegable duty to provide an employee with a safe place to work. This is so despite the fact that it may not own, control, or be under a primary obligation to maintain the premises on which the employee is injured. A railroad is not relieved from liability because such premises are unsafe or because of the existence of an unsafe condition brought about by the act of another without fault on the railroad's part.

309 F.2d 546 at 549. This holding was consistent with the Supreme Court's later holding in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709 (1963) wherein the Court approved "the more broad proposition" that a railroad has a nondelegable duty "to provide its employees with a safe place to work, even when they are required to go onto the premises of a third party over which the railroad has no control." 374 U.S. 1 at 7. See also *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 at 296 (6th Cir. 1989). More recently in *Parsons v. Sorg Paper Co.*, 942 F.2d 1048, 1050 (6th Cir. 1991), citing *Schiller v. Penn Cent. Transp. Co.*, 509 F.2d 263, 269 (6th Cir. 1975) the Court stated, "This is so despite the fact that [Grand Trunk] may not own, control or be under any primary obligation to maintain the premises where the employee is injured." *Id.*

Coupled with its broad duty with regard to Mr. Thomas' place of employment, the railroad was also faced with the relaxed standards for negligence and causation under the Act. The Sixth Circuit succinctly explained the standard in *Smith v. Consolidated Rail Corp.*, 91 F.3d 144 (table); 1996 WL 366283 (6th Cir. 1996):

“The Supreme Court has instructed that a relaxed standard of proof concerning causation applies in FELA cases.” *Ulfik*, 77 F.3d at 58. The test is whether “the proofs justify with reason the conclusion that **employer negligence played any part, even the slightest**, in producing the injury.” *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957); see *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 116 (1963). (emphasis supplied)

A copy of the *Smith* opinion is attached as **Exhibit M**.

Furthermore, in FELA cases, the negligence of the defendant “need not be the sole cause or whole cause” of the plaintiff’s injuries. *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603 (9th Cir. 1993). FELA plaintiffs must only demonstrate some causal connection between a defendant’s negligence and their injuries. *Mayhew v. Bell S.S.*, 917 F.2d 961, 964 (6th Cir. 1990); *Edmonds v. Illinois Cent. Gulf R.R.*, 910 F.2d 1284, 1288 (5th Cir. 1990). Recently, in a case under the Jones Act (Title 46 U.S.C. §668), which adopts the FELA for seamen, the Seventh Circuit Court of Appeals described the plaintiff’s burden as “very light” and “featherweight.” *Cella v. Unites States*, 998 F.2d 418, 427 (7th Cir. 1993).

The quantum of evidence necessary to establish liability under the FELA is similarly lower than that required in an ordinary negligence action. *Mendoza v. Southern Pac. Transp. Co.*, 933 F.2d 631, 633 (9th Cir. 1984). In the Supreme Court case of *Gotshall v. Consolidated Rail Corp.*, 512 U.S. 532, 114 S.Ct. 2396 (1994), the Court re-emphasized the remedial and liberal intent of the FELA. The Court stated:

We have liberally construed the FELA to further Congress’ remedial goal. For example, we held in *Rogers vs. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed. 2d 493 (1957) that a relaxed standard of causation applies under FELA. We stated that “[under] this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury of death for which damages are being sought.” *Id.*, at 506, 77 S. Ct. at 448.

Id. at 543, 114 S. Ct. at 2403 (emphasis added).

From those Supreme Court cases, it follows that a trial judge must submit an FELA case to a jury even when there is only the slightest evidence of employer negligence. *Long v. CSX Transp., Inc.*, 849 F. Supp. 594, 596 (S.D. Ohio 1993); *Wilson v. Chicago, Mil., St. P. & Pac. R.R.*, 841 F.2d 1347 (7th Cir. 1988). In *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994), the court noted:

Under FELA, however, the ordinary standards for negligence are relaxed so that an Employer subject to this statute is potentially responsible for risks that would be too remote to support liability under common law.

19 F.3d 824 at 826.

The railroad's duty with respect to snow and other weather conditions in areas where its employees work is usually left for the jury, even if the snow was still falling or had stopped falling shortly before the incident. For example in *Anderson v. Elgin J. & E. Ry. Co.*, 227 F.2d 91 (7th Cir. 1955), the court upheld a verdict against the railroad for injuries sustained by an employee who slipped on snow and ice while alighting from a train, even though the evidence showed that the snow and sleet had continued to fall up until the time of the accident. The Court found that whether or not the railroad should have taken additional steps under the circumstances was a question to be left for the jury. The same result was reached in *Chicago & Northwestern Ry Co. v. Rieger* 326 F.2d 329 (8th Cir. 1964). See also *Fort Worth & D.C.R.Co. v. Smith*, 206 F.2d 667 (5th Cir. 1953). Given the railroad's non-delegable duty to provide a safe place to work under the FELA, reasonable minds could not differ that the railroad was potentially liable to Mr. Thomas for his injuries and damages under the FELA, especially given Auto Warehousing's

duty under the contract, and the common law, to make the premises reasonably safe for the railroad, its employees and other business invitees.⁶

The majority opinion of the Court of Appeals recognized that when the foregoing law on liability and causation is coupled with the FELA law on damages, the settlement in this case was eminently reasonable. (**Exhibit D** p. 8). Unlike a workers' compensation action, the FELA allows a railroad employee to recover all of his common law damages against his employer, reduced only by his comparative negligence. This would have included his loss in earning capacity, his medical expenses, and his pain and suffering. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 33 S. Ct. 192 (1913). It does not matter that Mr. Thomas had a prior injury from which he had recovered and returned to work. As in a common law negligence action, the railroad takes the FELA plaintiff as it finds him. *Stevens v. Bangor & A. R. Co.*, 97 F.3d 594 (1st Cir. 1996). Moreover, an FELA plaintiff is entitled to recover for aggravation of preexisting injuries, and if the jury cannot distinguish between the aggravation and the preexisting injury, the railroad may be found liable for all of the claimant's damages. *Wise v. Union Pac. RR. Co.*, 815, F.2d 55, 58 (8th Cir. 1987); *Boyt v. Grand Trunk Western Railroad*, 233 Mich. App. 179, 186, 592 NW 2d 426, 431 (1999). Finally, the United States Supreme Court has most recently held that under the FELA, even if the employee's injuries are due to more than one cause, as long as they were caused in part by the railroad, the railroad is responsible for all of the plaintiff's damages. *Norfolk & W Ry Co. v. Ayers*, 538 U. S. 135, 123 S.Ct., 1210 (2003).

⁶ As a result, as noted by the Court of Appeals, railroads have long required indemnification agreements with industries to address instances, such as this, where the railroad ordinarily would be liable even though the accident occurred as a result of negligence by the industry. As such, the "potential" liability and reasonableness requirement should be construed to promote the purposes of those agreements and to encourage settlement.

2. The Settlement Was Reasonable.

When the evidence in this case is viewed within the legal framework cited above Grand Trunk's settlement in the amount of \$625,000 was eminently reasonable. Whatever else was true, the medical testimony and evidence demonstrated that Mr. Thomas was returned to work without restrictions at the railroad in late December of 1998. This was confirmed by both the deposition testimony and return to work slip of Dr. McNamee, as well as the testimony and records of Dr. Weiss. (**Exhibit E, Exhibit F**, pp. 16-17; **Exhibit G; Exhibit H** p. 37).

Dr. Weiss testified that the incident in 1999 was the cause of Mr. Thomas' permanent disability. (**Exhibit H**, p. 38). As noted above, Dr. Weiss explained that Mr. Thomas was able to return to work and able to cope with his job because he was able to use his good left shoulder and right knee to compensate for whatever shortcomings he may have had on the opposite joints. (Id., p. 37). Dr. Weiss also agreed that Mr. Thomas' disability subsequent to the 1999 incident was due to the fact that he no longer had one good shoulder and one good knee to rely on. (Id., pp. 38-39, 42-43). Dr. Weiss further stated that the 1999 incident most likely aggravated Mr. Thomas' prior injuries to his right shoulder and left knee as a result of the over compensation required by the injuries to the opposite joints. (Id., p. 39).

Dr. Pickering likewise testified that there was no question that Mr. Thomas was disabled from his job as a result of the injury sustained to his right knee at the Auto Warehousing premises on January 11, 1999. (**Exhibit J**, p. 35). Most telling was that Dr. Pickering testified that had the January 11, 1999 accident not occurred, he could not say how long Mr. Thomas would have continued to work, whether for another month or another ten years. (**Exhibit J**, p. 37).

As explained above, in addition to recovering for the lingering problems with his knees and shoulders, Mr. Thomas would have been entitled to recover for his pain and suffering arising from the four subsequent surgeries he underwent after the January 11, 1999 incident, as well as the pain and difficulties he would encounter the remainder of his lifetime. Moreover, as presented by Mr. Thomas' counsel at the facilitation in May of 2001 (and never contested by Auto Warehousing), a vocational rehabilitation expert had found that Mr. Thomas was "essentially unemployable" after the January 11, 1999 incident. Report of Robert Ancell, **Exhibit L.**

Moreover, the uncontradicted evidence of Mr. Thomas' economic expert indicated that his net wage loss and lost earning capacity reduced to present value to age 65 had a value of \$1,033,622.00. Of that figure only \$10,451.00 was attributable to wage loss prior to January 11, 1999. Report of Michael H. Thomson, **Exhibit M.**⁷ These figures result from the fact that Mr. Thomas as a railroad conductor earned an annual salary of \$85,000 to \$90,000; another fact which is not contested by Auto Warehousing.

The final evidence of the reasonableness of the amount of this settlement is contained in the findings by Judge Michael Stacey from the May 29, 2001 facilitation, who specifically determined that the settlement was reasonable. (**Exhibit A**). This Court, as did the trial court and Court of Appeals below, may take judicial notice of Judge Stacey's experiences both as a trial judge in Wayne County, and as a mediator/facilitator since his retirement from the bench.

⁷ The limited amount of lost wages attributable to Mr. Thomas' first injury is due in part to the railroad's allowing him to work at restricted duty during much of the time he was off, until he could return to work without restriction. This figure also supports the reasonableness of the allocation of \$100,000.00 to the settlement of the 1997 claim by Judge Stacey. While off, Mr. Thomas received payments of \$85,000.00 for restricted duty wages which were also a part of the settlement giving it a total value of \$185,000.00.

Given that Grand Trunk was facing a claim of net wage loss, lost benefits, and lost earning capacity of over one-million dollars, coupled with the fact that plaintiff had undergone four separate surgeries for his injuries subsequent to the January 11, 1999 incident, and plaintiff's own testimony that he was still having problems with his injuries, the resulting potential for a jury verdict in an FELA case with its complete common law damages and relaxed evidentiary standard of causation, was unquestionably well in excess of the \$625,000.00 paid by Grand Trunk in this case. The majority opinion of the Court of Appeals explained that there was more than enough medical evidence to support the settlement, especially when combined with the uncontested proofs on special damages which alone totaled over \$1,000,000.00. in lost wages and benefits. (**Exhibit D**, pp.9-10)

That a jury might have awarded more or less is not the point. To illustrate this, the majority opinion of the Court of Appeals cited the following language from *Burlington Northern, Inc., v. Hughes Bros., Inc.*, 671 F.2d 279, 283 (8th Cir. 1982): "A showing of reasonableness in an indemnity suit should not involve a plenary trial of the underlying FELA issues." (**Exhibit D**, p.8). When specifically discussing the reasonableness of this settlement the majority opinion held:

We do not read this statement to expand the analysis of the reasonableness of a settlement to include plenary consideration of liability issues in the underlying litigation. To do so would contravene the policy of encouraging the settlement of lawsuits.

Exhibit D, p.9. As explained in the majority opinion of the Court of Appeals, the evidence presented by Grand Trunk demonstrated there was no genuine issue of fact concerning whether the settlement was reasonable given the potential verdict exposure faced by the railroad.

To accept Auto Warehousing's position in this case would mean that an indemnitee could never settle an underlying claim short of verdict without the agreement of the indemnitor.

According to Auto Warehousing, the indemnitor can always say the indemnitee should not have settled and could have gotten a better deal, if a jury could have awarded less in the underlying case. Again, the question is not what the ultimate verdict would have been, but whether the settlement reached was reasonable. If Auto Warehousing thought the settlement was too high it was free to take over the defense of the case. Instead, Auto Warehousing did nothing and has presented no evidence that would raise a jury question on the issue of the reasonableness of the settlement.

Auto Warehousing's repeated references in its brief to the case of *Fashion House v. K Mart, Inc.* 892 F.2d 1076 (1st Cir. 1989) requires clarification by Grand Trunk. In *Fashion House*, the trial court directed a verdict against under K Mart on its indemnity claim, asserting that K Mart was required to prove that it would have been liable in the underlying claim. The trial court in *Fashion House* refused to admit or even consider any of K Mart's evidence on the reasonableness of the settlement. The First Circuit determined that the trial court had improperly refused to consider K Mart's indemnity claim, and found K Mart's evidence on reasonableness was sufficient to make out a prima facie case. In this case, the question was not the sufficiency of Grand Trunk's evidence, but whether, any jury question remained on the issue of the reasonableness of Grand Trunk's settlement. The procedural posture of *Fashion House* makes it inapplicable to this action.

The assertion by Auto Warehousing, that the settlement and allocation between the two accidents was the result of collusion or bad faith between Grand Trunk and Mr. Thomas is unsupported by the evidence and has no relevance. Auto Warehousing's unsubstantiated statement is an affront to the integrity of Judge Michael Stacey who expressly determined the settlement and allocation to be reasonable. In any event, as this Court explained in *Admiral*

Insurance Co. v. Columbia Casualty Ins. Co., 194 Mich. App. 300, 486 N.W.2d 351 (1992),

these types of charges have no effect on a determination of the reasonableness of the settlement.

Admiral contends that the trial court ignored evidence that, it claims indicates bad faith or collusion. However, this evidence is irrelevant to the reasonableness of the settlement. See *Ford v. Clark Equipment Co.*, 87 Mich. App. 270, 278-279, 274 NW 2d. 33 (1978). (Emphasis supplied).

194 Mich. App. 300 at 311. If any party was guilty of bad faith, it was Auto Warehousing by refusing to offer more than \$50,000.00 to settle the case. Auto Warehousing's actions left Grand Trunk with no recourse except to settle with Mr. Thomas and proceed with its indemnity claim. Auto Warehousing should not complain that it is left to reap what it has sown.

All that is relevant is whether, given the railroad's potential liability to Mr. Thomas under the FELA, the amount paid was reasonable based on Mr. Thomas' potential damages. The majority opinion properly concluded, and reasonable minds could not have differed, that the \$625,000.00 settlement paid by Grand Trunk for Mr. Thomas' January 11, 1999 incident was reasonable given all of the facts of this case.

RELIEF REQUESTED

Based on all of the foregoing, plaintiff-appellee Grand Trunk respectfully requests that this Honorable Court deny the application for leave to appeal.

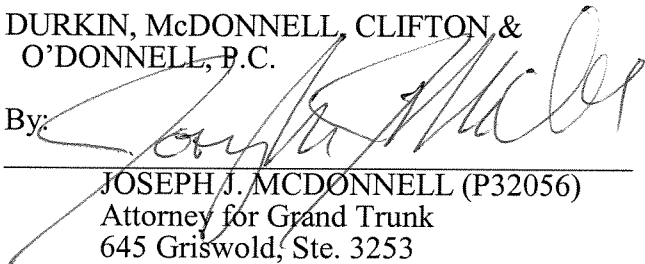
Respectfully submitted,

DATED:

8/23/04

DURKIN, McDONNELL, CLIFTON &
O'DONNELL, P.C.

By:



JOSEPH J. MCDONNELL (P32056)
Attorney for Grand Trunk
645 Griswold, Ste. 3253
Detroit, MI 48226
(313) 963-3033